**Sea Breeze Health Care Center, Inc. *and* United Food and Commercial Workers Union, Local Union No. 1657, AFL–CIO.** Cases 15–CA–14273 and 15–RC–8042

August 25, 2000

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS FOX, LIEBMAN, AND BRAME

On March 24, 1998, Administrative Law Judge Jerry M. Hermele issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief, and has decided to adopt the judge's rulings, findings, and conclusions as modified below[1] and to adopt the recommended Order as modified.

We adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act when Supervisor Joseph Chestang conducted a group interrogation of the housekeeping and laundry department employees, coercively interrogated employee Damon Simon, and made a veiled threat to employee Tondelayo Seals. We also agree with the judge, as discussed below, that the Respondent's "Union Truth Quiz" constituted an unlawful attempt to poll the unit employees regarding their union sympathies that further violated Section 8(a)(1) of the Act. Based on the Respondent's unfair labor practices in this case, we conclude that the Respondent has interfered with the election held in the representation case and we shall direct a new election.

1. Regarding the interrogations, the evidence shows that Chestang, director of the Respondent's housekeeping and laundry department, called a meeting of his employees the day after learning of the union activity. Chestang asked the approximately six employees who were present if they had "any knowledge of a union trying to get in." The employees denied knowing anything about union activity. Either that same day or about 3 days later, based on information he had received from another employee, Chestang individually questioned Simon regarding whether he was giving employees rides to union meetings. Simon replied that he was not.[2]

We agree with the judge that, under the totality of the circumstances test set forth in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub. nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), these interrogations were coercive. Here, Chestang's questioning of his employees at the department meeting made it clear to them that the Respondent wanted to find out about any union organizing activity, and implied to the employees that they were to let Chestang know what they found out. We find, contrary to the dissent, that this questioning violated Section 8(a)(1), particularly since none of the employees interrogated had yet disclosed their union sympathies.[3]

Our colleague sees it differently. He sees the questioning as "brief, casual and not followed-up." He finds that, in the absence of past hostility or discrimination by the Respondent, Chestang's questions to his subordinates do not reasonably imply any threats or promises, and do not establish that Chestang was seeking information about union activities on which to base disciplinary action. We disagree.

Both in words and context, Chestang's questioning contained elements of coercion and interference. The day after the Respondent learned of the union activity, Chestang, the director of the laundry and housekeeping department, called a meeting of his subordinates, the unskilled laundry and housekeeping employees. He asked them, as a group and in each other's presence, if they knew anything about a union trying to get in. The meeting—immediately following notice of union activity—and the questioning were pointed and certainly not casual. The point was to find out who was doing what in support of the Union, and employees reasonably would construe the questions as a directive to let Chestang know what they knew or found out. And, Chestang did not let the matter drop. He followed up, questioning at least employees Simon and Seals about their union activities. Indeed, Chestang later told employee Seals that he "was highly disappointed" in her because she did not tell him that she supported the Union. Also, the group gynamic of the questioning only heightened the likely

[1] We shall modify the judge's conclusions of law to conform to the violations he found.

[2] The judge did not resolve the credibility conflict between Chestang's and Simon's versions as to exactly when Chestang engaged in this questioning. Also, the judge did not resolve the conflict in testimony about whether Chestang asked Simon whether he had signed a union card. Accordingly, in affirming the judge's findings of unlawful interrogations, and in setting aside the election, we do not rely on the judge's finding that Chestang asked Simon whether he had signed a union card. We shall modify the judge's recommended Order and notice accordingly.

[3] See, in addition to the cases relied on by the judge, *Garney Morris, Inc*., 313 NLRB 101, 1115 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995); *Harbor Crest Electrical*, 307 NLRB 581, 587 (1992); *Farm Fresh*, 305 NLRB 887, 890 (1991); and *Taylor Chair Co.*, 292 NLRB 658 fn. 2 (1989).

We acknowledge that, as our dissenting colleague notes, only some, but not all, of the factors set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964), cited in *Rossmore House*, supra, for determining whether questioning is coercive support such a finding in this case. (The type of information sought and, in Simon's case, the failure to give a truthful reply that would reveal his union activity both militate in favor of a finding of coerciveness.) However, as the District of Columbia Circuit has noted, "strict evaluation of each [*Bourne*] factor" is not required, since the criteria are merely "a starting point for assessing the totality of circumstances." *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (1998), quoting *Timsco, Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987).

coerciveness of the questioning. Because Chestang chose to assemble the employees as a group to ask about union activities, each of the employees now knew that the chances were greater that their own union activities would be reported to Chestang by a fellow employee following Chestang's implied instructions that they do so. Thus, contrary to our colleague, we find Chestang's interrogation to be coercive and reasonably likely to interfere with Section 7 activities, even in the absence of implied threats of particular consequences or promises of particular rewards.

Our colleague contends that an employer may question employees about "an organizing campaign" so that it can better frame the issues and prepare its arguments in order to respond to a union's message. We acknowledge that an employer may engage in a dialogue with employees—that does not threaten or otherwise coerce—about the employment and unionization issues raised in a campaign. But, to the extent—as here—that an employer questions employees about their own or other employees' union activity, that questioning is circumscribed by the totality of the circumstances test set forth in *Rossmore House*, supra. Here, as discussed above, we have found Chestang's questioning of his subordinates about their knowledge of union activity to be coercive under the surrounding circumstances. Moreover, in finding interrogations to be coercive, the courts have long recognized that the natural tendency of such inquiries is "to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained," which is clearly not a legitimate purpose under Section 8(a)(1) of the Act. *NLRB v. West Coast Casket Co.*, 205 F.2d 902, 904 (9th Cir. 1953). As the Fifth Circuit, in *NLRB v. Laredo Coca Cola Bottling Co*., 613 F.2d 1338, 1342 fn. 7 (1980), cert. denied 449 U.S. 990 (1980), has observed:

> [A]n employee is entitled to keep from his employer his views so that the employee may exercise a full and free choice on whether to select the Union or not, uninfluenced by the employer's knowledge or suspicions about those views and the possible reaction toward the employee that his views may stimulate in the employer. That the interrogation might be courteous and low keyed instead of boisterous, rude, and profane does not alter the case.

[Quoting from the underlying decision in *Laredo Coca Cola Bottling Co.*, 241 NRLB 167, 172 (1979).]

In any event, the Employer's questioning here did not amount to an exploration of issues. Surely, our colleague cannot argue with a straight face that asking an employee whether he is driving fellow employees to union meetings will help an employer frame the campaign issues.

2. The evidence shows that employee Seals, after initially denying to Chestang that she was a union adherent, wore a union button and handbilled for the Union. Chestang told her that he was "highly disappointed" in her for supporting the Union and not telling him. Our dissenting colleague relies on the Board's decision in *Oklahoma Installation*, 309 NLRB 776 (1992), enf. denied mem. 27 F.3d 567 (6th Cir. 1994), to support his finding that Chestang's comments did not rise beyond protected free speech. In *Oklahoma Installation*, however, the Board found that a similar comment regarding a supervisor's "disappoint[ment]" with union activity was permissible in the absence of "some direct reference" by the supervisor equating protected activity with disloyalty to the employer. We find that the present situation is distinguishable from *Oklahoma Installation*.

The extreme disappointment that Chestang expressed over Seals' failure to report her union sympathies to him reveals Chestang's sentiment that Seals was acting disloyally by deceiving him and denying him information about the Union. In this context, we find that Chestang's expression that he was "highly disappointed" in Seals both for supporting the Union and not telling him about it was coercive and contained a veiled threat of reprisal against Seals in retaliation for her union activity, particularly if she did not keep him informed about such activity in the future. Thus, we adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act by this conduct. See *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1330 (2d Cir. 1996) (statements equating union support with disloyalty unlawful; hence, violation where company official told employees union effort was "extremely disloyal and ill-conceived"). Accord: *Ferguson-Williams, Inc*., 322 NLRB 695, 699 (1996) (unlawful to tell employee that her comments in defense of the union had "greatly offended" employer's chief officers); and *House Calls, Inc.*, 304 NLRB 311, 313 (1991) (telling employees that by seeking union representation they showed themselves "ingrates" unlawful).

3. During the preelection campaign, the Respondent prepared its "Union Truth Quiz" (see App. B) that consisted of 17 questions with an antiunion bias for employees to answer regarding their knowledge of the Union. The Respondent made the quiz available to employees throughout its facility at the nurses' stations and in the employee breakroom. The Respondent informed employees that the prize for completing the quiz was $1,427.60 that it would donate to the winning employee's favorite charity and that the deadline for submission was the day before the election. Employees had to identify themselves on the test sheet to become eligible to win the prize. According to the Respondent, the prize represented the amount of money that the Union would receive in monthly dues payments from the unit employees if they chose union representation. Phalisa Smith was the only employee who submitted a quiz and, following the election, the Respondent awarded the monetary prize to Smith's designated charity.

The Board considered a similar issue in the context of a representation case in *Melampy Mfg. Co.,* 303 NLRB 845 (1991). Relying on earlier decisions in *National Gypsum Co.*, 280 NLRB 1003 (1986), and *Houston Chronicle Publishing Co.,* 293 NLRB 332 (1989), the Board concluded there that the employer's contest was objectionable for the following reasons:

> [T]he objectionable aspect of preelection contests like this one lies in instructing the employees to sign their names to the tests. This not only informs the Employer which employees participated and which had been familiar with its campaign material, it enables the Employer to know where additional campaign efforts should be focused and affords "the potential for directing pressure at particular employees." [*National Gypsum*, supra.]

The Respondent in this case, like the employers in *Melampy*, *Houston Chronicle*, and *National Gypsum*, required employees to identify themselves as a condition of eligibility for the prize. Because the Respondent's contest was thus tantamount to effectively polling employees about their union sentiments, we conclude that the Respondent's conduct in preparing this questionnaire and making it available to all the unit employees as a contest with a substantial monetary prize is coercive under the Act. Thus, the Respondent, by coercively seeking to learn about its employees' feelings about unionization in this manner, has both violated Section 8(a)(1) of the Act and interfered with the election as the judge found.

Contrary to our dissenting colleague, the coercive effect of this contest is not dissipated by the fact that only one employee actually submitted a quiz, that the Respondent did not learn this employee's identity until after the balloting ended, and that the prize went directly to the employee's designated charity instead of directly to her. Whether or not the contest was a success in the eyes of the Respondent is not the point. Rather, just conducting the contest created an inherently coercive situation. Whether employees chose to enter or not enter the contest, they were put on the spot by being forced to choose and thereby declare themselves by their choice. If they took the quiz, the employees were required to identify themselves on the quiz form in order to become eligible to win the prize. Through their answers they would reveal themselves to the Respondent as being either relatively knowledgeable or relatively ignorant about the unionization issues that the Respondent obviously deemed important. If they chose not to play, they would reveal themselves to the Respondent as being inattentive and indifferent to those issues or unwilling to put their knowledge on display. Either way, they are forced to reveal themselves, and employees reasonably could discern that this contest was a tool by which the Respondent could poll employee sentiments and learn where individual employees stood on unionization. Accordingly, we adopt the judge's conclusion that the Respondent violated Section 8(a)(1) of the Act in this way also.[4]

4. Finally, we adopt the judge's recommendation that the Board set aside the election. It is well established that "[c]onduct violative of Section 8(a)(1) is, *a fortiori*, conduct that interferes with the exercise of a free and untrammeled choice in an election."[5] Thus, the Board's policy is to direct new elections in cases where unfair labor practices have occurred during the critical preelection period, unless the conduct is so de minimus as to warrant a finding that it did not impact on the election results.[6] In this case, Chestang conducted a group interrogation, separately interrogated an employee, and threatened an employee in another instance. Furthermore, each employee was confronted with the choice of taking the Respondent's "Union Truth Quiz," that we have found to be unlawful. Thus, the Respondent's unlawful conduct clearly was not de minimus in the context of this election. Accordingly, we shall direct a second election.

## AMENDED CONCLUSIONS OF LAW

Insert the following as paragraph 5 of the judge's conclusions of law, and renumber all subsequent paragraphs accordingly:

"5. By threatening employees because of their union activities, membership, or sympathies, the Respondent has violated Section 8(a)(1) of the Act."

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sea Breeze Health Care Center, Inc., Mobile, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Interrogating or polling any employees about their union activities or sympathies."

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the election held April 17, 1997, in Case 15–RC–8042, is set aside and that this case is severed and remanded to the Regional Director for Region 15 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

MEMBER BRAME, dissenting.

Contrary to the majority, I would reverse the judge and dismiss allegations that the Respondent violated Section

[4] In doing so, we rely on the analysis set forth above, and thus we do not pass on the judge's analysis set forth in sec. B, par. 4 of his attached decision.

[5] *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962).

[6] *Super Thrift Markets, Inc*., 233 NLRB 409 (1977).

8(a)(1) of the Act by Supervisor Joseph Chestang's conduct in allegedly interrogating and threatening employees and by the "Union Truth Quiz" that the Respondent disseminated as part of its preelection campaign. Because these alleged violations constitute the basis on which my colleagues and the judge conclude that the Respondent interfered with the representation election, I also disagree with their decision to set aside this election. Instead, I would certify the election results.

1. *Alleged Interrogations and Implied Threat*: On February 27, 1997,[1] Chestang, the Respondent's director of its housekeeping and laundry department, learned about the union organizing campaign at a supervisory meeting the Respondent held. After the meeting ended, Chestang asked employee Azerita Bryant if she knew anything about "a union campaign trying to get in there." Bryant replied that she was aware of it, that it had been going on for several months, and that fellow employee Damon Simon had been giving employees rides to union meetings.[2]

The next day, Chestang called a meeting of his department employees and asked if they had "any knowledge of a union trying to get in." The employees denied knowing anything about it. Later on February 28, Chestang spoke individually with Simon, who testified that Chestang asked him if knew anything about the Union and if he had signed a card. Simon stated that he responded negatively to both questions. Chestang admitted asking Simon if he knew anything about the Union, but expressly denied asking whether Simon had signed a card. The judge did not resolve this credibility conflict. Either during this same conversation or about 3 days later,[3] Chestang told Simon that he had learned Simon was giving employees rides to union meetings. Simon disputed this assertion. Simon subsequently became an open union adherent who wore a button and handbilled for the Union.

About this time, Chestang also discussed the Union with Tondelayo Seals, a housekeeping employee, in one of the patients' rooms. Chestang asked Seals if she knew anything about the Union, to which Seals replied that she did not. Chestang had another conversation with Seals a few days later in which he told her that "he was highly disappointed in [her]" for supporting the Union and not telling him. Later, in March, Seals, began handbilling for the Union and wearing a union button.

For the reasons stated below, I conclude that Chestang's questionings here were not unlawful. The Board's test for interference, restraint, and coercion under Section 8(a)(1) of the Act is an objective one and depends on "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."[4] Because interrogation is not per se unlawful, "[t]o fall within the ambit of Section 8(a)(1), the words themselves or the context in which they are used must suggest an element of coercion or interference." *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980). To assist in determining whether an employer's questioning of an employee is a "true interrogation" and therefore unlawful, the Second Circuit in *Bourne v. NLRB*, 332 F.2d 47, 48 (1964), considered the following factors: (1) the history of employer hostility; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of the interrogation; and (5) the truthfulness of the employee's reply. As the court in *Midwest Stock Exchange*, 635 F.2d at 1267, "the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the 'totality of the circumstances.'" This analysis, in my view, may also consider other factors such as the tone, duration, and purpose of the questioning and whether it was repeated.

Applying the *Bourne* factors to the incidents of alleged interrogation here, there is no evidence to establish a background of employer hostility and discrimination in which Chestang's queries to the housekeeping employees might reasonably be found to convey any implied threats or promises. It is also evident that Chestang's general inquiries regarding whether employees "had heard anything about a union campaign trying to get in there," if they had "any knowledge of a union trying to get in," and whether they had given employees rides to union meetings do not establish that Chestang was seeking information about union activities on which to base disciplinary action. Although my colleagues nonetheless conclude that the nature of Chestang's questioning establishes its coercive effect on the employees, the evidence shows that these inquiries were brief, casual, and not followed up. I do not find that Chestang's inquiries were coercive in this setting. Moreover, an employer may question employees in a noncoercive manner, as here, about an organizing campaign so that it can better frame the issues and prepare its arguments in order to respond to the union's message.[5] Regarding the identity of the questioner

[1] All dates are in 1997, unless otherwise noted.

[2] The General Counsel does not allege that Chestang's question of Bryant was an unfair labor practice.

[3] The judge again did not resolve the credibility conflict between Chestang's testimony that these remarks occurred during the same discussion and Simon's version that they had two different conversations about the union organizing campaign.

[4] *American Freightways Co*., 124 NLRB 146, 147 (1959) (footnote omitted).

[5] Courts have recognized the legitimacy of this pursuit so long as the questioning is not threatening or otherwise coercive. In *NLRB v. Shenanigans*, 723 F.2d 1360 (7th Cir. 1983), the company co-owners, at a social gathering, "asked a retarded employee whether any union people had visited him in his home,"; he admitted they had, ending the conversation. The court, in rejecting the Board's finding of a violation, stated at 1369: "An employer in planning his campaign has a legitimate interest in finding out whether the union has approached his employees, and if he merely asks—without pressing the inquiry when the employee

here, Chestang was a relatively low-level supervisor responsible for only the housekeeping and laundry departments. Thus, these alleged interrogations did not involve a high-ranking official with extensive authority to make decisions affecting the Respondent's operations. The evidence concerning the place and method of Chestang's questioning also does not support the conclusion that his conduct was threatening or coercive. Chestang's inquiries in this case occurred both in a group setting and during individual conversations. There is no showing, however, that Chestang attempted to isolate Bryant, Seals, and Simon or directed that they see him in his office so as to create an atmosphere of intimidation in the questioning of these employees.[6] Finally, as to the truthfulness of the reply, the employees questioned by Chestang in every case, excepting his conversation with Bryant, refused to provide any information about their own union sympathies or the organizing campaign generally. Even assuming that the employees did not respond truthfully to Chestang's inquiry, this is just one of the factors that the Board considers in deciding whether the questioning was coercive under the "totality of the circumstances" test.[7]

In sum, notwithstanding any contrary evidence on the last factor, an analysis of the *Bourne* criteria in this case requires a finding that Chestang's questioning was noncoercive. In so concluding, I stress that the evidence fails to establish that Chestang's manner or tone of voice was threatening or hostile; to the contrary, the record discloses that the conversations that Chestang had with employees were innocuous. This is particularly true of Chestang's inquiry to the group of employees on February 28 regarding whether they had "any knowledge of a union trying to get in." When the employees failed to provide any information on this subject, Chestang discontinued his questioning and concluded the meeting, as he did when he individually questioned Simon and Seals.[8] Thus, the evidence supporting the last factor of *Bourne* is diminished by the further showing that Chestang stopped questioning employees about their knowledge of the union activity after they failed to respond affirmatively to his inquiry For all these reasons, I disagree with my colleagues' and the judge's findings that the Respondent coercively interrogated employees regarding their knowledge of union activities.[9]

Although my colleagues do not rely on the judge's finding that Chestang unlawfully interrogated Simon about whether Simon had signed a union card in the absence of a credibility resolution on this point, even crediting Simon's version that Chestang made this inquiry, I would find no violation. Because Chestang's remarks conveyed neither threat nor promise, it logically follows that Chestang's questioning could not have been coercive and fell within the protection of the proviso to Section 8(c) of the Act.[10] Furthermore, Chestang's questioning, as in other instances here, was brief and nonconfrontational, he ceased the inquiry after Simon responded negatively, and did not revisit the subject. In

balks, or following up with coercive statements—he has not violated the statute."

I stress that, as in that case, Chestang ceased his inquiries here when the employee was unwilling to provide the information sought and that, unlike in *Shenanigans*, Chestang was not a top management official. Furthermore, even assuming, as my colleagues' assert, that Chestang's asking an employee whether he was driving his fellow employees to union meetings served no legitimate purpose, the questioning does not become, ipso facto, an unfair labor practice unless the General Counsel establishes that it was coercive. The majority, in finding that this inquiry was coercive, ignores the realities of the workplace where, "[b]ecause . . . supervisors and employees often work closely together, one can expect that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing unionization efforts." *Graham Architectural Products Corp. v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983), rehearing and rehearing in banc denied 706 F.2d 441 (1983), modified 706 F.2d 441 (3d Cir. 1983).

[6] In *Bourne*, supra, the court stated that the fourth factor in determining the lawfulness of employer questioning was the "[p]lace and manner of interrogation, e.g. was the employee called from work to the boss's office? Was there an atmosphere of 'unnatural formality?'" Here, the General Counsel has failed to establish that Chestang called employees into his office or otherwise created "an atmosphere of unnatural formality" when he discussed the Union with unit employees.

[7] My colleagues concede, even in finding coercive interrogations here, that not all of the factors set out in *Bourne* are present in this case. Yet, they readily find violations while purportedly applying a "totality of the circumstances" standard in this case where Chestang's questioning met at most two of the five-part test for coercive inquiries. The majority, in my view, has expanded *Bourne* without justification by its finding that Chestang's conduct violated the Act here.

[8] The judge's conclusion that Chestang engaged in "a coercive 'systematic interrogation' of his employees" and his reliance on *Custom Window Extrusions*, 314 NLRB 850, 855 (1994), to support the finding of a violation is misplaced. Here, Chestang simply made one brief, nonconfrontational inquiry to a group of employees regarding their knowledge of the organizing campaign. Thus, this case clearly did not involve a "systematic interrogation" where the employer *individually* asked a large group of employees about their union sentiments as was found unlawful in *Custom Window Extrusions*.

[9] In *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1249 (5th Cir. 1978), the court reversed the Board on 12 8(a)(1) findings of interrogation on the grounds, inter alia, that they involved low-level supervisors and employees in casual settings, were generally isolated and innocuous, and there was little evidence of employer hostility. The questions asked included: (1) What could the Union do for the employees? (2) Why are the employees supporting the Union? (3) What do you think about the Union? and (4) Why are you wearing union buttons? In determining that these inquiries did not violate the Act, the court found that "there was no systematic campaign of interrogation by the Company [as] the questions were more in the nature of casual remarks among friends" (id. at 1250) and that "there was no evidence that the questions were asked to obtain information for the purpose of reprisals by the Company [particularly where] the questions themselves were not on their faces threats of reprisal, nor were they coercive" (id. at 1251). I find that similar inquiries made by Chestang in this case also were not violative of the Act based on the evidence that, as in *Federal-Mogul Corp.*, he was a low-level supervisor, his remarks to employees were of a casual nature and were not accompanied by any threats of reprisal, and that the Respondent did not conduct a systematic campaign of interrogation as Chestang alone engaged in such questioning.

[10] Sec. 8(c) provides that: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the privisions of this Act . . . if such expression contains no threat of reprisal or force or promise of benefit.

these circumstances, I find that Chestang's inquiry constituted employer free speech and, therefore, did not constitute unlawful interrogation.[11]

Additionally, my colleagues and the judge seize on Chestang's statement that he was "highly disappointed" on learning that Seals was a union adherent to support their finding that Chestang's remark implicitly threatened Seals. Contrary to the majority, I conclude that Chestang was simply expressing his personal opinion about Seals' union sentiments and that Chestang was again acting within the realm of employer free speech when he did so. It is essential, as the Seventh Circuit stated in *J. C. Penney Co. v. NLRB*, 123 F.3d 988, 994 (7th Cir. 1997), in analyzing allegations of this kind to "differentiate between a threat and an exchange" that amounts to nothing more than a casual, lawful conversation between a worker and supervisor.

In *Oklahoma Installation*, supra, the Board found no violation of the Act on similar facts when, in the absence of some direct reference equating union activity with disloyalty to the employer, a plant manager said that he was "disappointed" with the employees and that they had "hurt [his] feelings" by starting "all this union bull." The employer's remarks in that case demonstrated far greater hostility toward the employees' union activities than did Chestang's mere expression of disappointment here. Furthermore, as in *Oklahoma Installation*, there is no evidence here that Chestang made any reference to disloyalty in telling Seals that he was "highly disappointed" with Seals. Chestang was a relatively low-level supervisor, there is no evidence that Chestang's tone or manner was threatening, and Chestang made no other statements that could be construed as promises or threats. In short, this was a casual conversation in which the disputed remark did not rise to the level of a veiled threat violating the Act.[12]

2. "*Union Truth Quiz.*" During the election campaign, the Respondent prepared a "Union Truth Quiz" that consisted of 17 questions for employees to answer and submit voluntarily to the Respondent by April 16, the day before the election. (See App. B.) The Respondent did not distribute the quiz, but rather made it available to employees at various nursing stations and in the employees' breakroom. The Respondent described the quiz in its brief "as a 'tongue-in-cheek' educational tool to get the employees to review the [Union] constitution, bylaws, and union documents and, admittedly, to take a couple of jabs at the Union." Despite the Respondent's offer of a $1427.60 cash prize (the amount it claimed that the Union would collect from the unit employees in monthly dues) that it would donate to the winning employee's favorite charity or church, Phalisa Smith was the only employee who submitted the answers to the quiz. Smith turned in her completed quiz the day before the election and the Respondent's officials testified that they did not review it until after the election was over. The Respondent then donated the winning prize to Smith's church as she had requested.

My colleagues and the judge find that the Respondent violated Section 8(a)(1) of the Act by making the "Union Truth Quiz" available to its employees. They conclude that, by this conduct, the Respondent unlawfully polled its employees regarding their union. I disagree.

The test for determining whether an employer's preelection propaganda constitutes an unlawful poll is whether the information it seeks would "[indicate] to the employer where additional campaign efforts should be focused and [afford] potential for directing pressure at particular employees."[13] The Respondent's "Union Truth Quiz" here was nothing more than a "tongue-in-cheek" educational tool designed to make the employees aware of the Union's constitution, bylaws, and fees, as well as its motives for initiating the organizing effort. The quiz was voluntary and consisted solely of multiple choice questions on these subjects. Thus, contrary to the judge's finding, this voluntary quiz did not require employees who completed it to disclose their own personal views about the union organizing campaign. Rather, it used multiple choice questions to test the test-takers' *knowledge* so that presumably they would consult the Respondent's campaign materials for the relevant facts. It simply did not probe the takers' position or inclination and its "availability" to all employees no more violated the Act than the Respondent's other unchallenged campaign propaganda.

Moreover, because only one employee submitted the completed quiz and the Respondent's officials, according to their undisputed testimony, did not even review it until

[11] See *NLRB v. Champion Laboratories, Inc.*, 99 F.3d 223, 227–228 (7th Cir. 1996) (court found no violation in the questioning of an employee about the number of production employees who had attended a union meeting held the previous day).

[12] I find that the cases that my colleagues rely on for a contrary result are distinguishable here because, unlike in this case, those employers equated the employees' union activities with disloyalty to their employer. Thus, in *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1330 (2d Cir. 1996), the employer's chief operating officer, in a loud and angry tone of voice, made a "hostile, highly personal reference" accusing the employee union organizers of being "disloyal" to the company which the court found "was sufficient to support the [judge's] and the Board's conclusion that there was an attempt to coerce employees into abandoning the Union, as well as an implicit threat of repercussions for union loyalty;" in *Ferguson-Williams, Inc*., 322 NLRB 695, 699 (1966), the employer's project manager accused an employee of disloyalty because she had made comments defending the union; and in *House Calls, Inc.,* 304 NLRB 311, 313 (1991), the employer's owner called the employees "ingrates" for seeking union representation and said that he would "put a key in the door" before signing a collective-bargaining agreement. By contrast, as stated, Chestang's statement in this case that he was "highly disappointed" with employees was not tantamount to accusing them of disloyalty, was not made by a high-ranking manager, and did not occur in conjunction with threats of plant closure.

[13] *National Gypsum Co.*, 280 NLRB 1003 (1986).

after the balloting, the lone submission could hardly have influenced the Respondent's election campaign or the election results. I also note that the prize did not go directly to employee Smith. Rather, the money went to Smith's church and thus did not benefit her personally. Based on all of these circumstances, I conclude that the humorous and innocuous quiz that the Respondent used in its preelection campaign was protected by Section 8(c) of the Act and therefore could have neither violated the Act nor warranted setting aside the election.[14]

In short, I find that the Respondent did not engage in any unfair labor practices or objectionable conduct in this case. Accordingly, I would dismiss the complaint and certify the election results.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten any employee because of their union activities, membership, or sympathies.

WE WILL NOT interrogate or poll any employees about their union activities or sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

SEA BREEZE HEALTH CARE CENTER, INC.

APPENDIX B

SUPPORT YOUR FAVORITE CHURCH OR CHARITY OR RESIDENTS

UNION TRUTH QUIZ

Attached is a quiz about the UFCW and some of Julee Jerkovich's claims. The answers are based on the most recently filed financial documents and the Union's Constitution and By-Laws (and a little common sense). If you want a copy of any of these documents, please let Anne know and she will give you one.

THE PRIZE

Since the Union would claim that we were trying to "bribe" employees if we gave the winner any money, we cannot do that. However, we will donate the prize in the winner's name, to his or her charity or church, or a "shopping spree" for residents of the winner's choice. (Your personal reward will be the knowledge that you gain about this important issue.)

HOW MUCH?

Since this is about the Union and the TRUTH, it seems appropriate that we should make the prize the same amount the Union wants to collect in dues from our employees each and every month—**$1,427.60.**

If there is more than one winner, the prize will be split evenly between all of those employees.

All entries must be submitted by Wednesday, April 16 by 9:00 a.m.

The winner will be announced as soon after that as we can score the entries.

GOOD LUCK . . . PAY ATTENTION THIS UNION IS A REAL PIECE OF WORK.

1. "No Sea Breeze employee will pay an initiation fee now, or in the future:

True_____ False_____

2. According to the UFCW's filings with the Federal Government, how many of its International Officers are "double dippers." (Officers who are paid by the International and another labor organization like a local union.)

(a) 7
(b) 11
(c) 22
(d) 32
(e) None

3. Last year, International President Dority was paid over $300,000 by the Union. How much was his "Executive Assistant" paid?

(a) $10,000
(b) $50,000
(c) $100,000
(d) $234,090.43

[14] Because the Respondent's "Union Truth Quiz" had no impact on this election, the majority is obliged to engage in unwarranted speculation as to the effect it may have had on the unit employees, including all but employee Smith, who chose not to participate in the contest. My colleagues miss the point that *National Gypsum*, as quoted above, sets forth the true test for determining whether an employer's campaign materials constitute objectionable polling. The Respondent's quiz in this case did not give the Respondent any information as to "where additional campaign efforts should be focused" and did not afford it with the "potential for directing pressure at particular employees." The majority is bootstrapping the results of earlier Board decisions to find objectionable conduct here by its finding that the Respondent's quiz was impermissible where only one employee participated, where her vote was not dispositive of the election, and where her answers were not known to the Respondent until after the election had ended.

(e) Nothing—he worked just for the Respect and Dignity of belonging to the Butchers Union.

4. Out of every $1.00 in dues paid to the Union by its members, how many cents went to pay the Union salaries, benefits, and expenses.

(a) 5 cents out of every dollar
(b) 10 cents out of every dollar
(c) 20 cents out of every dollar
(d) 43 cents out of every dollar
(e) 93 cents out of every dollar

5. Of the $2,000,000.00 in dues collected by UFCW Local 1657, how much was spent "on behalf of individual members?"

(a) $1 million
(b) $2 million
(c) $1.5 million
(d) $1.8 million
(e) $4,306

6. Once a strike is authorized by a vote of those present at a meeting during negotiations, the Union can order you to walk off the job.

True_____ False_____

7. Of the 9,641 members of Local Union 1657, how many have to show up and vote at a meeting to make it "official" and bind all members.

(a) more than 50% of the members
(b) more than 25% of the members
(c) 15% of the members
(d) 10% (5% of the Butchers and 5% of the Grocery Clerks)
(e) Seven members.

8. According to the International Constitution, Local Bylaws and financial documents, what are the sources of the Union's revenue or income?

(a) Dues
(b) Initiation fees
(c) Reinstatement fees
(d) "Special Assessments"
(e) Disciplinary fines
(f) Per Capita tax ("Head Tax")
(g) All of the above.

9. According to the International Constitution, how many dues increases has Local 1657 had without a members' vote?

(a) None
(b) One
(c) Two ($1.00 in 1994, and $1.00 in 1995).

10. You can always trust the Union to act in its own self-interest.

True_____ False_____

11. What was the average length of UFCW strikes from 1993 to 1995.

(a) One week without pay and benefits
(b) 3 days without pay and benefits
(c) There were no strikes
(d) 60.8 days without pay and benefits.

12. The Union has spent millions of dollars to repeat the "Right-to-Work" laws so they can force all employees to join the Union and pay dues.

True_____ False_____

13. Article 38 of the International Constitution (p. 27) states: "All financial obligations imposed by or under this Constitution and Local Union by-laws shall be legal obligations of the members upon whom imposed and shall be enforceable in a court of law." What does this mean?

(a) If a member gets behind in dues or does not pay a "special assessment" or disciplinary fine, the Union can sue the person in court and take his property.
(b) The Union can garnishee a person's wages at any job he holds.
(c) The Union always wants its money.
(d) The employee gets shafted.
(e) All of the above.

14. Which of the following are disciplinary "offenses" that subject a union member to monetary fines?

(a) Violating "any provision" of the International Constitution or any "law" or directive of the union.
(b) Failure to pay dues, fines and assessments.
(c) Talking to another employee about getting rid of the Union with another vote.
(d) Disturbing the "peace or harmony" of a Union meeting.
(e) Buying anything at a store that has a picket line put up by any union recognized by the UFCW
(f) Failing to walk off the job and leave your residents when ordered to do so by the Union.
(g) All of the above

15. "You always decide what you have in any Union contract."

True_____ False_____

16. A UFCW organizer in North Carolina confessed to forging employee signatures on 400 union authorization cards.

True_____ False_____

17. What happened to the 417,000 members that the UFCW lost from the 1.4 million Julee Jerkovich claims to have?

(a) They retired and now live on the beach in Hawaii.
(b) Their grocery store went out of business
(c) They passed away.
(d) They quit.
(e) Nobody knows and nobody cares.

**Name**

**If I win, I want my prize donated to_____**

*Charles R. Rogers, Esq*., for the General Counsel.
*Dean E. Rice* and *Cynthia L. Gleason, Esqs. (Fisher & Phillips),* of Atlanta, Georgia, for the Respondent.
*Juleeann M. Jerkovich,* of Birmingham, Alabama, for the Union.

DECISION

I. STATEMENT OF THE CASE

JERRY M. HERMELE**,** Administrative Law Judge**.** On April 17, 1997, the United Food and Commercial Workers Union, Local Union No. 1657, AFL–CIO (the Union), lost an election, by a vote of 37 to 42 (with one disputed ballot), to organize the unskilled employees at a nursing home in Mobile, Alabama. The Union filed unfair labor practice charges and objections[1] to the election result, alleging various campaign irregularities and requesting that the outcome be set aside. On June 30, 1997, the General Counsel filed a complaint against the Respondent, Sea Breeze Health Care Center, Inc. (Sea Breeze), alleging various violations of Section 8(a)(1) and (3) of the National Labor Relations Act. These alleged violations involved interrogations, polling, surveillance of and promises to employees before the election, the elimination of overtime for one employee before the election, and the interference with the work of two employees on election day. Sea Breeze generally denied these allegations in its July 11, 1997 answer. Then, on July 30, 1997, both the General Counsel's complaint and the Union's objections were consolidated for a hearing.[2]

This case was tried from October 14–17, 1997, in Mobile, Alabama, during which the General Counsel and the Union called 10 witnesses, and Respondent called 11 witnesses. During the hearing, the Union withdrew Objection 5(c). And after the hearing, the Respondent and the General Counsel filed briefs, on December 5 and 7, respectively.

II. FINDINGS OF FACT

Capitol Care Management Company, Inc.[3] (Capitol Care), based in Atlanta, Georgia, operates approximately 120 nursing homes and 60 retirement centers, the vast majority of which are not unionized and are located in the southern United States (Tr. 519, 826). In June 1994 it purchased the Sea Breeze nursing home in Mobile, Alabama (Tr. 812). The facility was closed in 1994 but it was relicensed, and reopened by Capitol Care in January 1995 (Tr. 696). In 1996 Sea Breeze derived gross revenues over $100,000 and purchased/received over $50,000 in goods from outside Alabama (GC Exh. 1(j)).

Other than the management and administrative staff, the Sea Breeze workers are skilled and semiskilled, such as registered nurses (RNs) and licensed practical nurses (LPNs). Then, there are the unskilled workers such as certified nursing assistants (CNAs) (also known as nurse's aides) and laundry/housekeeping workers, almost all of whom are black women.

It is these unskilled workers that the Union attempted to organize in its campaign which commenced on February 27, 1997, when the union organizer, Juleeann Jerkovich, presented the Sea Breeze administrator, Anne Kogelschatz, with a letter announcing the Union's intention (Tr. 696–697). Jerkovich is a veteran of many campaigns to organize nursing home workers in the South (R. Exh. 5).

George Hunt was the Sea Breeze "Human Resources" supervisor in early 1997 (Tr. 507). He and Ron Smith, Capitol Care's regional director for Alabama and Georgia, were in charge of Respondent's opposition to the Union's election campaign (Tr. 545, 811). Hunt had experience in six prior union organizing campaigns and, as such, instructed the Sea Breeze department heads on the dos and don'ts of dealing with employees during the campaign. For example, Hunt told them that they could not threaten or interrogate employees, spy on employees, or make promises to employees. However, it was permissible to "provide information about the union to employees" (Tr. 546–547, 557–558). Hunt himself would talk to an employee about the Union if he happened to meet one in the hallway, for example (Tr. 577). Kogelschatz also talked to prounion employees in an attempt to persuade them to vote against the Union (Tr. 771).

According to Hunt, some Sea Breeze employees were bothered by union supporters visiting their homes after work (Tr. 507–508). So, upon complaining to Hunt and Kogelschatz (Tr. 736), management prepared the following flyer for distribution to Sea Breeze employees (Tr. 820):

> DON'T BE COMING AROUND MY HOUSE
>
> THE LABOR BOARD MADE THE COMPANY GIVE A LIST OF EMPLOYEES NAME AND ADDRESSES FOR THE VOTE, BUT. . . .
>
> THAT WAS NOT AN INVITATION TO COME BY MY HOUSE FOR A "FRIENDLY VISIT" TO PRESSURE ME ABOUT THE UNION.
>
> THIS IS TO PUT YOU ON NOTICE THAT YOU ARE NOT WELCOME AND I WANT YOU TO STAY AWAY FROM MY HOME AND STAY AWAY FROM ME.

(GC Exh. 3.) Smith told the supervisors to place the flyers on nurse's stations and breakrooms in the facility, but not to distribute them to employees "personally" (Tr. 812). Hunt also posted one of the flyers on the first floor bulletin board. The flyers were not to be returned by employees to management. Rather, according to Hunt, the flyer was supposed to be given by any employee who wished one directly to the Union (Tr. 509–510). According to CNA Deandrea Wilson, a Sea Breeze supervisor may have passed out the flyer directly to employees (Tr. 216–223). CNA Teresa Bell testified that LPN Veronica Whisby (now Veronica Roberson) told her that the flyer was supposed to be returned to Kogelschatz. Whisby indicated her prounion sentiments to Bell. Bell then asked Whisby for a

[1] Charges were filed on March 27, May 31, and June 19, 1997, and objections were filed on April 23, 1997.

[2] The Regional Director approved the Union's withdrawal of Objections 1(b) and (d). Also, he noted that Objections 1(a), (c), (e), 2(a), and (b) were concurrent with the General Counsel's unfair labor practice allegations.

[3] Capitol Care's parent, Retirement Care Associates, is the actual owner of the Sea Breeze facility. Capitol Care manages the facility (Tr. 507). Capitol is misspelled "Capital" in the transcript.

bunch of flyers and promptly threw them in the trash, with Whisby's knowledge (Tr. 346–347, 803).

Another company campaign tactic was the "Union Truth Quiz." Hunt, Smith, and Kogelschatz prepared this "tongue-in-cheek" document for placement at the nurse's stations and in the employee breakroom (Tr. 510–512, 820). The Quiz consisted of 17 questions with a distinct antiunion flavor, to be submitted by April 16, 1997, and a line for the employee's name. The prize for completing the Quiz was $1427.60, which would be donated to the winning employee's church or charity. The $1427.60 represented "the same amount the Union wants to collect in dues from our employees each and every month." (GC Exh. 2). Only one laundry employee, Phalisa Smith, submitted the answers to the Quiz. After the election, management announced that Smith won the $1427.60 and Sea Breeze donated that amount to her church (R. Exh. 6; Tr. 513, 586, 596–598).

During the election campaign, Hunt hired Reverend David Jones, a black labor relations consultant, whose campaign record for employers was 615 victories and only 10 losses. Jones instructed Sea Breeze management on campaign strategy. According to Hunt and Kogelschatz, Jones never wore a clerical collar at the facility nor discussed religion (Tr. 521–526, 576–577, 714, 717). However, housekeepers, Virginia Morrissette and Tondelayo Seals, and CNAs Deandrea Wilson, Teresa Bell, and Evelyn Wooten testified that Jones wore a clerical collar while talking with the employees about the bad aspects of unions (Tr. 34, 101–103, 185, 416–417, 478).

In January 1997, Sun Health Care (Sun) signed a letter of intent to purchase Retirement Case Associates, including the Sea Breeze nursing home.[4] Hunt invited Sun's personnel director, Connie Johnson, to speak to the Sea Breeze employees before the election to ease their anxiety about the acquisition, which was scheduled to occur in June 1997 (Tr. 105, 514–516). "Give Sun a Chance" buttons were worn by some antiunion employees during the campaign (Tr. 36–37). Other employees wore prounion buttons (Tr. 111). Johnson met with the employees before election day and was asked several times in the meetings about what specific benefits Sun would provide to the employees when Sun took over. According to laundry employee Lewis Taylor and CNAs Bell and Wooten, Johnson declined to give specifics, saying only that Sun would provide "better" dental and insurance benefits, "better" health care and "better" working conditions. In sum, Johnson told the employees to "give Sun a chance" (Tr. 250–251, 350–352, 476). But some employees were disappointed when Johnson failed to provide specifics (Tr. 517). However, according to Kogelschatz, Johnson did not even use the word "better" to respond to questions about Sun's benefits (Tr. 734–735). And housekeeper Tondelayo Seals got the "impression" that Sun's benefits would be better, notwithstanding Johnson's refusal to be specific (Tr. 124–125). Also at this meeting, Johnson showed an antiunion videotape which stated that unions are violent and turn employees against each other (Tr. 399–402).

As discussed supra, Sea Breeze management had discussions with the employees during the election campaign about the Union. For example, housekeeper Seals was told by management that she had the right to join a union (Tr. 122). On the other hand, Kogelschatz met with several CNAs in late February or early March 1997 and stated that "for the Union to come up in there, somebody had to participate to get them up in there. . . ." According to CNA Bell, Kogelschatz had "a book, a tablet, in her hand" at this meeting. After Kogelschatz' statement, Bell revealed that she was "a card signer" for the Union (Tr. 344–345). The next day, RN Netha Johnson asked Bell how she felt about the Union, in the presence of several other people, whereupon Bell reiterated her prounion stance to Johnson. Johnson stated that management instructed the RNs to talk to the CNAs about the Union. Johnson then told Bell about the pros and cons of a union but revealed that she (Johnson) was prounion too (Tr. 342–343, 610–612).

In March 1997 payroll clerk Martha Fredrickson was instructed by Kogelschatz to talk to five employees about Sun and to distribute "Give Sun A Chance" buttons and copies of the union constitution and bylaws (Tr. 427, 442–445). Fredrickson does not attend management meetings and does not supervise any employees. In this regard, she does not hire, fire, discipline, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or adjust the grievances of any employee (Tr. 438, 448–450). Also in March, Fredrickson asked CNA Deandrea Wilson "How do you feel about this thing going on?" Wilson replied, "Well, what thing you talking about," to which Fredrickson replied "This union thing." (Tr. 179–181). At the time, Wilson did not yet wear a union button. A few days later, maintenance supervisor Jessie Smelly, who did not usually talk to her, asked her "How do you feel about this thing going on?" She replied, "What thing?" wanting Smelly to use the word "union" because Wilson knew this was not permitted. Finally, Smelly replied, "This union stuff." Smelly stopped talking when other people came by, and then when he and Wilson were again alone he added "There's going to be a lot of static around here if we get that union in." Wilson was not wearing a union button during this talk with Smelly (Tr. 208–214).[5]

Joseph Chestang is the director of housekeeping and laundry at Sea Breeze. On February 27, 1997, Kogelschatz called a meeting of supervisors to find out what they knew about the Union. After the meeting, Chestang asked one of his employees, Azerita Bryant, if she "heard anything about a union campaign trying to get in there." Bryant said yes and added that Damon Simon was helping the Union. The next day, before he received any training from management about what he could or could not do during an election campaign, Chestang called a meeting of his employees and asked all of them if they had "any knowledge of a union trying to get in." Chestang then asked Simon, a floor cleaner, if he had signed a union card and whether Simon was giving employees rides to union meetings. Simon told Chestang no to both questions (Tr. 133–135, 652–656). Simon later wore a union button and handbilled for the Union (Tr. 138). Chestang also spoke with housekeeper Seals, asking her "did I know anything about the union." Seals said no. At this point, she had not revealed her prounion position to management yet. Later, Chestang again spoke with Seals, telling her that he was "highly disappointed in me" for supporting the Union and not telling him (Tr. 79–83, 98, 665). In March, Seals started handbilling for the Union and wearing a union button (Tr. 99, 111).

During the campaign, Lewis Taylor, a laundry worker on the 5 a.m. to 1 p.m. shift, wore a prounion button. Chestang told

[4] Sun is based in Albuquerque, New Mexico, and owns nursing homes in the United States, Canada, and Great Britain (Tr. 518–519).

[5] Smelly does not remember Wilson or any conversation with any employee about the Union (Tr. 685).

him he was surprised to see him wearing a union button and if he had a problem he should have come to Chestang (Tr. 237–240). Before this conversation with Chestang, Taylor substituted about twice a month for Katrina Smith, who worked the midnight—5 a.m. shift and often called in sick. Smith would call Taylor, who would then call Chestang to receive permission to come in early and work the overtime (Tr. 241). As a general rule, however, overtime is discouraged at Sea Breeze (Tr. 663, 812–813). Indeed, in late 1996 an internal Sea Breeze memorandum warned that "overtime . . . must be controlled." (R. Exh. 17). Thus, if it is necessary to cover an open shift, it is preferable to use an employee whose additional hours would not create the need to pay overtime. But, unlike nursing duties, management does not consider it essential always to fill a vacant laundry shift (Tr. 700–701). And because there are few laundry employees it is difficult to find replacements (Tr. 280–281, 702). After Taylor started wearing a union button, Chestang denied Taylor's request for overtime. This was Chestang's first such denial of Taylor's request. As it turned out, nobody covered the vacant shift. After the April 17, 1997 election, Chestang denied his request again, stating that he needed to cut down on overtime (Tr. 241–243, 275). Thereafter, Chestang simply told Taylor to come in an hour or two early if Smith called in sick again (Tr. 277). According to Chestang, the denial of Taylor's requests for overtime had nothing to do with Taylor wearing a union button (Tr. 664). Rather, Chestang stated that he turned Taylor down because Taylor was covering for Smith without his permission and because Chestang's supervisor was complaining about excessive overtime (Tr. 672, 681). From January 1996 to mid-1997, there was very little overtime approved in the laundry department. Specifically, only 71 hours of overtime were approved in the 6-month tenure of Taylor, constituting just 1.2 percent of the total hours worked in the department (R. Exh. 15).

During the campaign both the Union and Respondent passed out campaign literature (GC Exhs. 4, 5, 7; R. Exhs. 1, 3–4, 9–10, 12–14). One antiunion handbill stated that "[Jerkovich] and your helpers promote racism." (U. Exh. 2).

Election day was April 17, 1997, and the polls were open from 6:45 to 8:30 a.m., and from 3 to 4 p.m. (Tr. 356). Voting took place on the first floor of the facility across from a nurse's station (Tr. 357). According to Personnel Director Hunt, it was difficult to keep the employees focused on their work that day and he anticipated that some employees would want to leave a little early (Tr. 534–535, 564). So, Hunt told the LPNs to instruct the employees not to leave before the end of their 3 p.m. shifts so that the second-shift employees had a chance to vote and replace the first-shift employees (Tr. 542–543).

During the morning vote, the Union hung a sign "Vote Yes" across the street from the nursing home, on non-Sea Breeze property (U. Exh. 1). Union Steward Kelly Luker was asked by Respondent's attorney, Dean Rice, to take the sign down because, according to Luker, Rice said it was on Sea Breeze property (Tr. 317–318). Hunt then took a picture of the sign with the consent of one of Jerkovich's associates (Tr. 538–539). Luker did not take the sign down until the morning vote was over. Then she rehung the sign for the afternoon vote (Tr. 320––323). Before the afternoon vote, Hunt obtained a 27-foot long truck and parked it catty corner in front of the Sea Breeze entrance in order to block the view of the sign from the entrance, as well as to block some of the noise coming from the union supporters near the sign. Hunt conceded, however, that the truck idea did not work well (Tr. 535–538, 541). In that regard, the union supporters moved elsewhere with their sign. And the truck moved after the voting started (Tr. 296–298).

In between the voting sessions, Chestang told Taylor to clean up a storeroom and watched him do so for the 15 minutes that it took (Tr. 244–245). Although cleaning the storage room was not usually part of his job, Taylor had done it before (Tr. 282–283). When Taylor was done, Chestang told him and another employee, Phalisa Smith, to gather laundry upstairs, after learning of a laundry shortage in the facility. Chestang accompanied both Taylor and Smith on the laundry hunt and helped them (Tr. 656–658, 669). According to Taylor, this was the only time during which Chestang "followed" him as he worked (Tr. 245–247, 286–287). According to Smith and Chestang, these laundry hunts occurred about once a week, took about an hour, and normally included Chestang as well as the hunters (Tr. 586–588, 599–600, 657–658). After the hunt was over, someone from the Union called Hunt to complain about Chestang. Hunt contacted Kogelschatz, who talked with Chestang. But Chestang denied doing anything improper (Tr. 561–562).

Before the 3 p.m. vote, CNA Bell, who was a union observer, saw Mark Havard and Hugh Ash near the voting area. Havard is the rehabilitation director at Sea Breeze but is not employed by the nursing home directly. Ash is Havard's boss. Bell was stationed in the voting room as the voting session began and could see Havard and Ash talking at the nurse's station directly across from the voting room. Either Havard or Ash was on the telephone. Bell notified the Board agent, Nora Flaherty, about the presence of the two men, whereupon Flaherty approached the two men and asked them to leave the area. Havard did not take part in the Respondent's campaign and was not even sure when the voting was scheduled that day. They left immediately when asked to do so by the Board agent (Tr. 360–362, 411–413, 602, 614–621. No voters were yet present in the area and the Board agent submitted no memorandum about the matter (Tr. 693–694).

As the See Breeze administrator, Kogelschatz walked around the facility a lot on "compliance rounds" (Tr. 705). Virginia Morrissette and Tondelayo Seals worked their regular 7 a.m. to 3 p.m. second-floor housekeeping shifts on April 17, 1997. Customarily, they would leave the second floor on the elevator with their cleaning carts at 2:45 p.m., put the carts away on the first floor, and wait to clock out at approximately 2:53 p.m. Although their shifts do not end until 3 p.m., a 7-minute early clockout was allowed by Fredrickson, the payroll clerk, because the housekeepers would come in seven minutes before 7 a.m. and/or it did not look good to have a bunch of people milling around the timeclock between 2:53 and 3 p.m. waiting to clock out (Tr. 20–22, 48–52, 61–62, 797). Kogelschatz was aware of this practice and she told Chestang to tell his people to stop it (Tr. 766).

Morrissette and Seals both wore union buttons on election day. Both women had voted in the morning session that day (Tr. 26–27, 89–90). Seals' lunch was supposed to start at 12:15 but it was delayed until 12:30 p.m. But this had happened before and since April 17, 1997 (Tr. 111–115). Later that day, however, as they were preparing to take the elevator downstairs at 2:45 p.m., Kogelschatz, who was also on the second floor, noticed that the front of the nurse's station was "absolutely filthy" (Tr. 709). According to Kogelschatz, certain employees were "slacking off" before election day. Kogelschatz warned no employee, however, before April 17 about slacking off (Tr.

708, 741). But on spotting Morrissette and Seals at the elevator door, she instructed them to clean the nurse's station. According to Seals, the front wall thereof was clean, but Seals said nothing (Tr. 131). This task took about 10 minutes and was completed at about 2:58 p.m. (Tr. 764). According to Morrissette and Seals, this task took only a few minutes, and was completed at approximately 2:50 p.m., whereupon Kogelschatz told them to wait on the second floor until 3 p.m. with nothing to do (Tr. 22–23, 87–88). Kogelschatz denied telling them to stay until 3 p.m., estimating that it took until then to finish the job (Tr. 764). Morrissette had already cleaned the nurse's station earlier that day, as was her custom, but it is unclear if she also cleaned the front wall of the station (Tr. 30–31, 129–130). Just before 3 p.m., from the second floor window, Morrissette and Seals noticed other employees in the parking lot leaving work (Tr. 24, 88). At least some of those employees were wearing pro-Sun buttons (Tr. 91–92). Finally, Morrissette and Seals went downstairs and clocked out just after 3 p.m. (Tr. 52–53, 94–95). The next day, April 18, Kogelschatz called Morrissette and Seals into her office to apologize about the delay and tell them she bore no grudge against them. Then, Kogelschatz hugged both women (Tr. 40–41, 56, 96, 712–713).

The Union lost the election by a vote of 37 to 42, with 1 ballot disputed (GC Exh. 1(o)). Hunt and Kogelschatz left Sea Breeze shortly after the election (Tr. 507, 698). As of late 1997, Sun's acquisition of Sea Breeze has still not occurred (Tr. 515). Also as of late 1997, 61 of the 80 voters in the election remain as employees at Sea Breeze (Tr. 650).

## III. ANALYSIS

The General Counsel's unfair labor practice allegations fall into five broad categories: (a) eight separate interrogations by four different supervisors during the campaign in violation of Section 8(a)(1); (b) two different methods of polling the employees during the campaign, in violation of Section 8(a)(1); (c) the elimination of one employee's overtime in violation of Section 8(a)(1) and (3); (d) the election day harassment of one employee in violation of Section 8(a)(1); and (e) the election day detention of two employees in violation of Section 8(a)(1) and (3). Those union objections to the election that are separate from the General Counsel's unfair labor practice allegations cover seven areas: (a) promises made by Sun to better working conditions; (b) management's use of racist literature against the Union; (c) the impermissible use of religion to defeat the Union; (d) stationing two supervisors near the polls to influence the voting; (e) hindering the ability of prounion employees to campaign on election day while making it easier for antiunion employees to campaign; (f) blocking the view of, and attempting to remove, a prounion sign on election day, plus restricting union handbilling activity that day; and (g) photographing the prounion sign on election day.

### *A. Interrogations*

The Union delivered the election petition to a surprised Sea Breeze administrator, Anne Kogelschatz, on February 27, 1997. Immediately, Kogelschatz met with the various Sea Breeze supervisors to ascertain what they knew about the Union. In that connection, housekeeping supervisor Joseph Chestang endeavored to question his employees. And it is this series of interrogations that is most damaging to Respondent's case.

Specifically, the evidence clearly shows, and indeed Chestang admits, that he called a meeting of his six or so employees on approximately February 28 and asked them if they had "any knowledge of a union trying to get in." Then, he asked Azerita Bryant, in a separate encounter, if she "heard anything about a union campaign trying to get in . . . ." On learning about Damon Simon from Bryant, he then questioned Simon if he had signed a union card and was giving employees rides to union meetings. Next, Chestang talked to Tondelayo Seals twice, first asking her if she knew anything about the Union, and later, after learning of Seals' prounion status, telling her that he was "highly disappointed" in her for supporting the Union and not telling him. The General Counsel correctly points out that, regarding all of these interrogations, Chestang failed to communicate a valid purpose to his employees or assure them that there would be no reprisals for their answers or lack thereof. Respondent, however, contends that Chestang's actions were friendly "casual interactions" with his close-knit housekeeping unit, were merely generated by his "curiosity," and did not contain any threats.

In determining whether an interrogation of an employee violates Section 8(a)(1), the totality of the circumstances must be considered. *Blue Flash Express*, 109 NLRB 591 (1954). Thus, the place and method of the interrogation, the background thereof, the nature of the information sought and the identity of the questioner are all important factors to evaluate. *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Before February 1997 there is no history of Respondent's hostility or discrimination against union supporters. Also, Chestang's group interrogation, later separate questioning of Bryant and first separate questioning of Seals were general and nonthreatening: did they know anything about a union? See *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Also, these incidents occurred very early in the election campaign and did not take place in a closed setting such as Chestang's office, for example. Compare *Basin Frozen Foods*, 307 NLRB 1406, 1416 (1992). On the other hand, none of the aforementioned interrogatees was yet an open union supporter. Indeed, Simon falsely denied knowing anything about the Union and giving rides to union supporters, indicating that he was afraid of Chestang's questions. Next, all of these incidents took place at work, and during normal working hours. Further, Chestang's questioning of Simon got very specific about the latter's union activities. And, Chestang's second conversation with Seals constituted a veiled threat: he was "highly disappointed" in her for supporting the Union. Finally, Chestang's initial group meeting smacks of a coercive "systematic" interrogation of his employees. See *Custom Window Extrusions*, 314 NLRB 850, 855 (1994). Thus, on balance, the presiding judge concludes that Chestang's multiple remarks tended to restrain, coerce, and interfere with his employees' Section 7 rights. See *Hertz Corp.*, 316 NLRB 672, 684 (1995).

Next, RN Netha Johnson interrogated CNA Teresa Bell. Specifically, Johnson asked Bell how she felt about the Union on orders from upper management to talk to employees during the campaign about the pros and cons of the Union. However, Bell was openly for the Union at this point. Further, several other people were present during this conversation and Johnson even told Bell that she was prounion too.

The legal standard for determining the coercive nature of an interrogation is an objective, as opposed to subjective, test. Thus, it usually makes no difference whether the interrogatee is an open union supporter and thus whether the employee is actually coerced. Rather, the key inquiry is "whether the questioning tended to be coercive." *Heartland of Lansing Nursing*

*Home*, 307 NLRB 152, 156 (1992). Under the total circumstances of the Johnson-Bell interrogation, the presiding judge concludes that the encounter was not coercive. Johnson was not Bell's immediate supervisor. The conversations occurred in the presence of several people. Johnson already knew of, and indeed shared, Bell's prounion sentiments. There were no threats and the conversation was relatively casual. Thus, on balance, there was no 8(a)(1) violation. See *Emery Worldwide*, 309 NLRB 185, 186 (1992).

Payroll clerk Martha Fredrickson asked another CNA, Deandrea Wilson, "How do you feel about this thing going on?. . . This union thing." Wilson was not yet a union supporter and she replied "What thing?" At the outset, while it is clear that Fredrickson is not a supervisor, the General Counsel still argues that her statement is unlawful because, as a payroll clerk with independent judgment, she is Respondent's "agent;" a status Respondent does not deny. Again applying the totality of the circumstances test, the presiding judge finds no violation of the Act. Logically, Fredrickson's lesser agent status reduces the coerciveness factor. Moreover, Fredrickson's question to Wilson was extremely general. Thus, it cannot be said that her remark was specifically calculated to elicit a declaration from Wilson about her union sentiments. See *NLRB v. McCullough Environmental Services,* 5 F.3d 923 (5th Cir. 1993).

The final interrogation involves Wilson and maintenance supervisor Smelly, who usually did not talk to her but did ask her how she felt "about this thing going on." Wilson, who was a closeted union supporter, egged Smelly on to use the word "union" which he finally did. Smelly stopped talking when other people walked by but continued when they were alone to add that "There's going to be a lot of static around here if we get that union in." The totality of the circumstances, however, shows no unlawful interrogation by Smelly. Significantly, Wilson's conduct smacks of entrapment. Also, Smelly is not Wilson's direct supervisor and, in the Presiding Judge's view, his "static" remark is too vague to constitute any kind of a threat.

### *B. Polls: Flyer and Quiz*

The General Counsel alleges that the "Don't Be Coming Around My House" flyer was an unlawful attempt to poll the employees before the election inasmuch as only antiunion employees would presumably be interested in taking the flyer. In support of this allegation, it is contended that LPN Whisby once told CNA Bell that, if she took one, the flyer would have to be returned directly to Kogelschatz. Also, the General Counsel points out that the flyer contained a signature line.

If this flyer consituted an impermissible preelection poll it was certainly a remarkably unsuccessful one. The record evidence reveals absolutely no information that Respondent gleaned from this "poll" about its employees. Indeed, other than CNA Bell, who threw a bunch of flyers in the trash, there is no evidence that a single employee took the flyer, much less that Respondent tracked who took a flyer and who did not. Moreover, the flyer was left at various nurses' stations as opposed to being distributed by supervisors to specific employees. Finally, the presiding judge accepts personnel director Hunt's credible explanation that the flyer was supposed to be given by the employee directly to the Union. As for Bell's testimony that Whisby told her that the flyer was supposed to be turned in to Kogelschatz, it is significant that Whisby, a credible witness, did not corroborate Bell's verson about the destination of the flyers. Finally, no employee testified that he or she believed that the flyer was supposed to be turned in to management. So, it cannot be concluded that the flyer constituted an impermissible poll or interrogation.

Turning to the "Union Truth Quiz," the General Counsel likewise characterizes it as an unlawful preelection poll. By way of summary, the Quiz was a "tongue-in-cheek" antiunion document left at the nurses' stations and breakroom, and was due 1 day before the election. Unlike the flyer, it elicited one response: from laundry employee Phalisa Smith, who was declared the winner of the $1427 prize. According to the rules of the Quiz, that money was then donated to Smith's designated charity after the election.

The Quiz presents more problems than the aforementioned flyer because it was designed to be turned in to management before the election and was in fact responded to by one employee. At the outset, it is well-settled that an employer's preelection poll of its employees generally violates Section 8(a)(1). *Struksnes Construction Co.*, 165 NLRB 1062 (1967). The same is true for raffles. And, although an employer's use of a raffle as preelection propoganda is not per se objectionable, *Heartwood Avenue Corp.*, 225 NLRB 719 (1976), all of the circumstances thereof must be evaluated. Here, it is important to consider whether the Quiz, which had aspects of both a poll and raffle, was used to determine employees' sympathies or designed to sway an employee's vote. Accordingly, it is concluded that Respondent may have learned more about Phalisa Smith's union sympathies than it was entitled to know, notwithstanding the lack of any evidence about what her sympathies were.[6] As for whether Smith's vote was swayed, if indeed she voted at all, it cannot be concluded that the $1427 prize did so. Indeed, *direct* prizes totalling approximately this same amount have been found to be "not so substantial as to warrant setting aside an election." *Sony Corp. of America*, 313 NLRB 420 (1993). However, it is concluded that Respondent designed its Quiz to poll its employees and may have learned about the union sympathies of one employee.

### *C. Harassment of, and Elimination of Overtime for, Lewis Taylor*

The General Counsel alleges that after laundry employee Lewis Taylor started to wear a prounion button on approximately March 13, 1997, his immediate supervisor, Joseph Chestang, began to retaliate against him. Indeed, Chestang told Taylor that he was surprised to see him wearing the button. First, it is alleged that Chestang stopped assigning Taylor overtime after March 13. Although the written record evidence is unclear as to exactly how much overtime was available to Taylor after March 13, it is clearer from Taylor's testimony that Chestang turned down his request for overtime created by the absence of Katrina Smith twice: March 15 and sometime in late April, after the election (Tr. 242–243). But Chestang had approved Taylor for overtime on February 23, 1997, to cover Smith's absence, and 15 hours of overtime on three occasions in January 1997 for other reasons.

Respondent has the better of the argument on the overtime issue. To begin with, there was not all that much overtime available in the laundry department during Taylor's tenure: only 71 hours in the 6-month period from mid-November 1996 to mid-May 1997. And Taylor covered for Smith only once

[6] Smith, however, did testify as a Sea Breeze witness.

before March 13. Thus, it cannot be concluded that Chestang's denial of Taylor's two overtime requests after March 13 disrupted a well-established practice of assigning Taylor overtime. Second, Chestang did allow Taylor to work some overtime after April 17 by coming in an hour or two early. Third, it is significant that Respondent assigned overtime to nobody else to cover the shifts missed by Smith. Fourth, Chestang's explanation that he denied Taylor's two overtime requests because of Respondent's policy to reduce overtime is plausible in view of the written evidence produced by Respondent showing management's desire to curb overtime. Hence, the General Counsel has failed to show, by a preponderance of the evidence, that Respondent denied Taylor overtime because of antiunion animus.

Turning to the alleged harassment of Taylor by Chestang on election day, Chestang told Taylor to clean up a storeroom, which was usually not part of his job, and watched over him for the 15 minutes it took. Then, Chestang accompanied Taylor and Phalisa Smith on the "laundry hunt" upstairs; a procedure that Taylor testified to as never having happened before or after. The General Counsel alleges that Chestang's actions constituted survillance of Taylor, while Respondent characterizes Chestang's behavior as "supervision of and assistance to" Taylor.

Again, the evidence supports Respondent's position. Regarding the storeroom incident, Taylor admitted that he had been required to perform this task previously. As to Chestang's watching of Taylor for the 15-minute period, the evidence is simply insufficient to conclude whether this was unusual. As for the laundry hunt, Phalisa Smith's testimony is significant. Smith corroborated Chestang's position that these hunts were common and normally included Chestang. While the General Counsel intimates that Smith is a witness whose testimony may have been unduly influenced because she won Respondent's "Union Truth Quiz," the Presiding Judge finds her to be a credible witness who gave a thorough rendition of the laundry hunt procedure. Therefore, the preponderance of the evidence fails to establish any surveillance or harassment of Taylor by Chestang.

### *D. Alleged Dentention of Morrissette and Seals*

The last unfair labor practice allegation concerns the detention of housekeepers Morrisette and Seals on election day which, according to the General Counsel, prevented these two union supporters from campaigning from 2:45 to 3 p.m. Respondent contends that Kogelschatz merely asked Morrissette and Seals "to take a few minutes before the end of their shift to clean filthy counter tops."

The evidence does not support a conclusion that Kogelschatz intentionally detained these two prounion employees for 15 minutes in an effort to prevent them from campaigning between 2:45 and the 3 p.m. afternoon voting session. First, there is absolutely no evidence that Morrissette or Seals intended to campaign in this time period. Second, it was common for Kogelschatz to walk around the facility on "compliance rounds." Thus, it cannot be concluded that Kogelschatz was lying in wait for these two women at 2:45 p.m. Third, although Morrissette had cleaned the top of the nurses' station earlier that day, she had not cleaned the "filthy" front of the station. Fourth, while the last-minute cleaning job may have been completed before the stroke of 3 p.m., it is also true that Kogelschatz disapproved of CNAs leaving before the end of their regular shifts. Thus, it cannot be said that Kogelschatz's last minute work order was a pretext to delay the two womens' departure. Finally, the "early departure" of other employees that day, some of whom were wearing Sun buttons, is a red herring: there is no evidence that Kogelschatz or other supervisors specifically approved these other departures. Therefore, no impermissible disparate treatment regarding the departure of the first shift employees on election day has been established.

### *E. The Union Objections*

As discussed supra, Sun was on track in early 1997 to purchase the Sea Breeze facility. In Objection 3, the Union alleges that Sun representative Connie Johnson,[7] along with Sea Breeze supervisors Kogelschatz, Smith and Hunt, made various promises of "future employee benefits" in the election campaign, plus threats that these benefits would be withheld if the Union won the election. The inquiry on this issue focuses on two matters: the distribution of "Give Sun a Chance" buttons during the campaign, and the statements by Johnson, during preelection group meetings with the employees, that Sun would provide "better" benefits and working conditions.

The Union intimates in its objections that the election contest was a Sun versus Union affair. The plain fact though is that Sun is not a named Respondent in this case. And it is well settled that the Board accords less weight to the conduct of nonparties in determining whether an election should be set aside. *Orleans Mfg. Co*., 120 NLRB 630 (1958). Moreover, it is very difficult to conclude that Sun's very general promise to make things "better" was contingent on the Union's loss in the upcoming election. Compare *Highland Yarn Mills*, 313 NLRB 193, 207 (1993) (8(a)(1) violation where supervisor said that if the Union was gone employees would make more money and air quality in plant would improve). Hence, the Union's objections based on Sun's involvement in the campaign will be overruled.

The Union next alleges in Objection 4 that Respondent improperly injected race and religion into the campaign. With respect to race, the Union claims that Respondent "distributed literature accusing the union and its agents of promoting racism." The sole evidence of this consists of one of Respondent's antiunion flyers, which states, among other things, that union organizer "[Jerkovich] and your helpers promote racism." The context for this statement is the fact that virtually all of the unskilled Sea Breeze employees are black, while most of management is white. This underwhelming evidence, however, warrants dismissal of this objection. As for the claim that Respondent's use of Reverend Jones in its campaign "used religion to influence the sympathies of the voters," the only evidence thereof is the testimony of five employees that Jones wore a clerical collar while talking to them about the bad aspects of unions. And even this claim is contradicted by Hunt and Kogelschatz, who testified that Jones never wore a clerical collar. Suffice it to say that collar or no collar, the Union's evidence on its religion allegation is insufficient.

In Objection 5(a), the Union claims that Respondent stationed Supervisors Havard and Ash near the voting areas on election day "to monitor and influence employees while they entered to vote." As the evidence reveals, however, Havard and Ash accidentally entered the general voting area, left im-

[7] The Union incorrectly calls her Connie Snyder in the written objections.

mediately when asked to do so, and that no voters were even present when they were there. Accordingly, this objection will be dismissed.

In Objection 5(b), the Union claims that antiunion employees were afforded a greater opportunity to campaign on election day than prounion employees. As discussed supra, however, there is no evidence of a policy by Respondent regarding antiunion employees, and insufficient evidence of such a policy regarding prounion employees, including Morrissette and Seals.

In Objection 5(d), the Union complains that Respondent interfered on election day in two ways with the prounion sign across from the Sea Breeze facility. First, Union Steward Luker testified that Respondent's attorney asked her to take the sign down on election day. But the sign stayed up. Thus, it is difficult to discern any actual harm to the Union's campaign regarding the sign. Second, Respondent parked a truck on its property to block the view of the sign from the facility's entrance and to reduce the noise coming from the union supporters around the sign. So, the Union moved the sign. Again, any damage to the Union's campaigning is difficult to discern. Finally, the Union produced no evidence in support of its allegation in this objection that Respondent "restricted access to the Union's handbilling activity. . . ."

The Union's final Objection 5(e) claims that Respondent photographed "protected union activity including the union's campaign posters and signs." But the evidence only shows that Hunt took a picture of the union sign with a union supporter's consent. No Sea Breeze employee or union campaigner was photographed. Compare *Reno Hilton*, 319 NLRB 1154, 1156 (1995). Therefore, there is insufficient evidence to sustain this objection.

### *F. Summary*

When an employer violates Section 8(a)(1) during an election campaign, the usual remedy is to order a second election because such prohibited conduct interferes with the "laboratory conditions" of the first election. *Dal-Tex Optical Co.*, 137 NLRB 1782 (1962). The only exception to this policy is where the misconduct is de minimis: "such that it is virtually impossible to conclude" that the election outcome was affected. *Super Thrift Markets*, 233 NLRB 409 (1977). In this connection, the number of violations, their severity, the extent of dissemination and the size of the unit, are among the relevant factors to consider in determining whether the misconduct warrants setting aside an election result. *Caron International*, 246 NLRB 1120 (1979).

Here, Respondent committed two kinds of 8(a)(1) violations: housekeeping supervisor Chestang's multiple interrogations of his staff and a threat to one employee; and the "Union Truth Quiz." Although the Chestang interrogations occurred very early in the election campaign, one was a very specific request for information about an employee's protected activity and one contained a veiled threat against another employee. As for the Quiz, while it was generally ignored by all employees except one, it constituted an attempted preelection poll of all eligible voters. Further, the closeness of the vote—a five-vote union loss out of 80—also tips the scale in favor of a new election.[8] Compare *Caron*, supra (one employee out of 850 affected by employer misconduct); *Essex International*, 216 NLRB 831 (1975) (four-vote margin, only 2 of 325 employees affected). In sum, while it should be emphasized that the General Counsel and the Union have failed to prove the vast majority of their allegations, the allegations that have been proven are too substantial, and the voting margin too close, to reach any other conclusion.

## IV. CONCLUSIONS OF LAW

1. The Respondent, Sea Breeze Health Care Center, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, United Food and Commercial Workers Union, Local Union No. 1657, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Pursuant to paragraphs 7(a), (b), (c), and (d) of the General Counsel's complaint, Respondent violated Section 8(a)(1) of the Act by interrogating certain of its housekeeping employees about their union activities, membership and sympathies.

4. Pursuant to paragraph 12 of the complaint, Respondent violated Section 8(a)(1) of the Act by interrogating and polling its employees with the "Union Truth Quiz."

5.The General Counsel has failed to prove its allegations at paragraphs 7(e), 8, 9, 10, 11, 13, 14, and 15 of the complaint.

6. The Union's Objections 1(a) and 2(b) are sustained.

7. The Union's Objections 1(c), (e), 2(a), 3, 4, 5(a), (b), (d), and (e), are overruled.

8. The unfair labor practices and campaign misconduct of Respondent described in paragraphs 3, 4, and 6, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

## ORDER

Accordingly, IT IS ORDERED that the Respondent, Sea Breeze Health Care Center, Inc., its officers, agents, successors and assigns, shall:[9]

1. Cease and desist from

(a) Interrogating or polling any employees about their union activities, membership or sympathies.

(b) Threatening any employee because of their union activities, membership, or sympathies.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action.

(a) Post at its facility in Mobile, Alabama, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps

[8] The bottom line, however, is that an early second election is unlikely. Continued litigation ensures that. By contrast, an end to legal hostilities means the Union is entitled to a new vote any time after April 17, 1998 (the 1-year anniversary of the first vote), provided it obtains an adequate showing of support from the employees.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business, been purchased or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent since February 1997.

(b) File with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

3. IT IS FURTHER ORDERED that the election held in Case 15–RC–8042 on April 17, 1997, is set aside, and that the case is remanded to the Regional Director for Region 15 for the purpose of conducting a new election.